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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN RAILWAY AND
AIRWAY SUPERVISORS ASSOCIATION, *et al.*,
Petitioners,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a railroad which is, and for many years has been, a party to the railroad industry's national health and welfare plans, and which has participated in national negotiations concerning those plans, may refuse to participate in national negotiations over those plans and may negotiate individually to establish its own health and welfare plans in lieu of the national plans, without providing notice of its intentions to all participants in the national plans and negotiating over those matters in national negotiations.

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v.

SOO LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners [1] respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on December 13, 1989 in *American Railway and Airway Supervisors Association, et al. v. Soo Line Railroad company*, 891 F.2d 675 (8th Cir. 1989).

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 891 F.2d 675 and is reprinted as Appendix A hereto at 1a-10a. The ruling of the United States District Court for the District of Minnesota

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[1] Petitioners are labor organizations which represent various classes and crafts of railroad employees throughout the United States, and whose members receive health and welfare benefits under the railroad industry's national health and welfare plans. Petitioners, referred to herein as the "Unions," are listed individually in Appendix E hereto.

(Murphy, J.), was issued on July 6, 1988 and is reported at 690 F. Supp. 802 (D. Minn. 1988), and is reprinted as Appendix B hereto at 11a-23a. The District Court's judgment is printed in Appendix C hereto at 24a-27a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its decision on December 13, 1989. Petitioner has not sought rehearing and is filing this petition within the time prescribed by 28 U.S.C. § 2101(c). Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The complaint underlying this action was brought under the Railway Labor Act [hereinafter, "RLA"], 45 U.S.C. § 151, *et seq.* (Sections 2 First, 2 Second and 2 Third, 45 U.S.C. §§ 152 First, Second and Third). Relevant portions of that statute are reprinted as Appendix D hereto at 28a-29a.

STATEMENT OF THE CASE

Petitioners are labor organizations most of which represent employees of Respondent Soo Line Railroad Company [hereinafter, "Soo"] under the RLA. The other petitioners represent railroad employees and are participants in the national health and welfare plans which are at issue here. The underlying complaint was brought by the Unions on behalf of their members in response to the Soo's refusal to participate in national negotiations over proposals for changes in the railroad industry's national health and welfare plans. Moreover, rail labor's complaint challenged the Soo's insistence upon individual bargaining with subordinate components of the Unions over its proposal that it withdraw from the national plans and the national agreement establishing the industry-wide plans.

The Unions asserted that the Soo could withdraw from the national plans only by serving notice of its intentions

upon all parties to the national plans and by negotiating over its withdrawal in national negotiations, or "national handling" as it is referred to in the railroad industry.[2] In short, the Unions argued that the Soo could depart from the agreements establishing the national plans and national handling of health and welfare issues only through national handling, the same method by which it became a party to those agreements. The Eighth Circuit rejected the Unions' arguments, concluding that requiring the Soo to bargain nationally over its exit from the national health and welfare agreements and from national handling of health and welfare issues woud infringe upon the Soo's rights under the RLA to designate its own representative for collective bargaining. Appendix A at 5a-7a, *citing* 45 U.S.C. §§ 152 Third and Fourth.

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[2] Comprehensive negotiations involving rail unions and at least a substantial majority of rail carriers has been a rail industry practice since the turn of the century. *See* Harry E. Jones, *Wages and Labor Relations in the Railroad Industry 1900-1941* at 34-37, and *Hearings on S. 2646 Before Senate Subcommittee of the Committee on Interstate Commerce*, 68th Cong., 1st Sess. at 70-76 (1926) (Statement of C. P. Neil). *See also* H. D. Wolf, *The Railroad Board*, at 5-6, 12-13, 101-102 (Univ. of Chicago Press 1927). The practice of negotiating national agreements expanded during World War I under the Director General's operation of the railroads. *Id.* at 18-20, 39-44, 133-134, 166-169; *see also International Association of Machinists, et al. v. National Railway Labor Conference*, 310 F. Supp. 905, 911-912 (D.D.C. 1970), (*"IAM v. NRLC"*), *appeal dismissed*, 463 F.2d 872 (D.C. Cir. 1972). Negotiation of national agreements involving virtually all major rail carriers and all rail unions has been an industry practice for almost 60 years; indeed many of the most important agreements in the industry have been negotiated in that manner, *see e.g.*, the landmark Washington Job Protection Agreement of 1936, the national agreement between the unions and railroads constituting 85 percent of the nation's existing rail trackage which was referred to by this court in *Order of R.R. Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 337-338 (1960). Although the Court of Appeals concluded that national handling necessarily involves the designation of national bargaining agents for all participants (Appendix A at 2a), as is discussed *infra*, in Part III of the Reasons for Granting the Writ, the Unions submit that that conclusion is fundamentally erroneous.

The Unions respectfully seek the Court's review of the Eighth Circuit's decision because its effect would be to undermine many existing national agreements and to destabilize collective bargaining in the railroad industry; and because the Eighth Circuit's decision is in conflict with the decision of the District of Columbia Circuit in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad*, 383 F.2d 255 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968) ("*Atlantic Coast Line*"). And while the Unions agree that the Soo unquestionably has the right to designate its own representative for collective bargaining, they submit that that right would not be infringed upon by requiring the Soo to negotiate nationally over its proposal to withdraw from the national plans.

A. The Origin of the National Plans

The national health and welfare benefit plans had their origin in a 1954 agreement between a coalition of approximately 100 rail carriers and a coalition of approximately 15 unions. Pursuant to that agreement, the parties jointly subscribed to a national group health and life insurance policy with the Travelers Insurance Company ("Travelers"); that policy was designated as Travelers Group Policy No. GA-23000. *See*, Report of Emergency Board No. 114 at 27-29 (December 12, 1955).

The 1954 agreement had no fixed expiration date and, under the RLA, no expiration date was implied as a matter of law; indeed like most RLA agreements, the 1954 agreement was of indefinite duration. However, as is the practice in the industry, the parties initially, and subsequently, negotiated moratorium clauses which limited the service of proposals for changes in the national plans. Appendix B at 15a and n.4. *Cf. Brotherhood of Railway Airline and Steamship Clerks v. Florida East Coast Ry.*, 384 U.S. 258, 246-248 and n.7 (1966).

Through subsequent negotiations, more unions and more carriers became parties to the national health and welfare agreement, benefits were changed and dental and retiree

plans were negotiated. By 1985, the three health and welfare benefits plans covered approximately 320,000 active railroad employees and 9,500 retired railroad employees on 242 railroads. Appendix A at 3a. All modifications of the national plans which were made over the years were made through national negotiations. Appendix A at 2a-3a.

B. The History of the Soo's Bargaining Over Health and Welfare Issues and Background of the Current Dispute

Both the Soo's predecessor carriers and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company [hereinafter, "Milwaukee"], a railroad whose lines and agreements the Soo acquired in 1985, were parties to the 1954 agreement, and were participants in Group Policy No. GA-23000 when it was established in 1955. Between that time and 1985, the Soo, including its predecessors and the Milwaukee, always participated in national bargaining of health and welfare issues either by authorizing a multi-carrier committee to bargain on their behalf or by agreeing to be bound by the results of national bargaining; indeed in the round of negotiations which preceded the Soo's effort to withdraw from the national plans, the Soo expressly authorized the National Carriers' Conference Committee [hereinafter, "NCCC"] to be its representative in bargaining over health and welfare issues.

In early 1984, the Unions served Section 6 notices on various railroads including the Soo, for changes in rates of pay, rules and working conditions, including health and welfare benefits; the unions requested that each carrier designate the NCCC as its bargaining representative for negotiations on their proposals. Appendix B at 13a. Although the Soo agreed to national negotiations concerning pay and work rules, it refused national handling with respect to health and welfare benefits, stating that it would negotiate those matters "locally" and that it "intended to withdraw from the Travelers' policy and develop its own plans through self-insurance." *Id.* The Soo then

attempted to negotiate agreements with local union officials for the provision of health and welfare benefits under its own insurance plans, and it entered into agreements with local committees representing approximately 10 percent of its employees (Appendix B at 14a and n.3); however, the Soo conceded (Answer to Plaintiffs' Interrogatory No. 9) that the agreements covering most of those employees were contingent upon the results of this litigation.

C. The District Court's Decision

The district court rejected the Soo's contention that requiring it to negotiate nationally over its withdrawal from the national plans and over its decision to bargain locally about health and welfare issues, would infringe upon its rights under Section 2 Third and Fourth of the RLA. According to the district court, "an organization's selection of its bargaining representative is independent from its choice whether to engage in national handling" so that "it is possible that Soo, even if it chose to represent itself, may have been required to participate in centralized negotiations with a coordinated labor bargaining representative such as the CRLO, as well as with the NCCC." Appendix B at 18a, footnote omitted.

However, upon review of *Atlantic Coast Line* and subsequent decisions which relied upon *Atlantic Coast Line*, the district court concluded that "courts have found national handling to be obligatory only after the parties had commenced national bargaining and then one attempted to withdraw or take action inconsistent with national handling." Appendix B at 19a, footnote omitted. The district court further relied upon precedent under the National Labor Relations Act, [hereinafter, "NLRA"], 29 U.S.C. § 151, *et seq.*, that "withdrawal from multi-employer bargaining units may not be restricted prior to the commencement of bargaining." Appendix B at 20a-21a, footnote omitted, *citing Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 410-412 (1982). Finding that the Soo noti-

fied the Unions of its intention to bargain locally before the national bargaining commenced, the district court concluded that Soo could not be required to engage in national negotiations on this issue. *Id.*

D. The Court of Appeals' Decision

The court of appeals recognized that Section 2 First of the RLA (45 U.S.C. § 152 First) imposed upon the Soo obligations to "exert every reasonable effort to make and maintain agreements" and to negotiate in good faith with the Unions; however, it held that the statute's guarantee that unions and carriers may designate their own representatives for collective bargaining precluded an order requiring the Soo to engage in national negotiations on its intention to withdraw from the national plans. Appendix A at 5a. The Court acknowledged that the Unions had denied any intention to dictate the Soo's choice of bargaining representative, but it concluded that the practical effect of the Unions' position was to the contrary (Appendix A at 7a), apparently upon the assumption that national handling necessarily involves the designation of national representatives for all participants in the bargaining process. Appendix A at 2a n.1.

The court of appeals concurred in the district court's determinations that the decision in *Atlantic Coast Line* and its progeny, which held national handling could be compelled in appropriate circumstances, were limited by the rationale of *Bonanno Linen* and other NLRA cases in which compulsory multi-party bargaining was limited to situations in which a party attempted to withdraw from multi-party bargaining after such bargaining had begun; and that *Atlantic Coast Line* and its progeny were actually consistent with that NLRA precedent. The court of appeals rejected the Unions' contention that the *Bonanno Linen* line of cases was inapplicable in this case because *Bonanno Linen* turned upon the expiration of existing

multi-party agreements and negotiations of new agreements under the NLRA, whereas RLA collective bargaining agreements do not expire and are subject to modification only through negotiations under Section 6 when contractual bars on service of Section 6 notices (the so-called "moratorium clauses") permit the filing of proposals for changes. The court found that the running of the moratorium period and the service of Section 6 notices were sufficiently like the expiration of NLRA agreements and the negotiation of new agreements that it was appropriate to conclude that despite the differences between the two statutes, the rationale of the NLRA precedent was applicable in this case.

Furthermore, since it concluded that the ability to refuse multi-party negotiations was derived from Section 2 Third, the court rejected the notion that a reluctant party could be compelled either to participate in national handling indefinitely or to bargain over the exercise of the purported statutory right to refuse national handling. Appendix A at 8a. However, it recognized that an adverse party retained the concommitant right to authorize a multi-party representative to negotiate on its behalf with the party seeking individual negotiations. *Id.* at 9a.

In sum, the Eighth Circuit held that even if a carrier is a party to a national agreement, established and amended through national handling, that carrier does not violate the RLA by seeking to withdraw from the national agreement through individual bargaining, so long as it announces its intention to withdraw prior to the commencement of negotiations for modification of the national agreeemnt, and so long as it complies with other RLA requirements concerning maintenance of existing agreements until bargaining and mediation are completed.

REASONS FOR GRANTING THE WRIT

This case presents significant issues affecting collective bargaining in one of the most important industries in the nation. Unlike other industries, there are many national agreements in the railroad industry which apply to virtually all major employers. If allowed to stand, the Eighth Circuit's decision would destabilize those existing national agreements, and would impede negotiation of additional national agreements because parties could simply withdraw from national handling over the subjects of those agreements whenever the moratorium provisions of those agreements permitted the filing of proposals for changes. The Eighth Circuit's decision would also lead to increased disruption of commerce because of the multiplicity of negotiations and potential disputes involving similar issues.

The need for the Court to grant the requested writ to address the questions presented herein is underscored by the Sixth Circuit's recent decision which substantially adopted the Eighth Circuit's reasoning. *United Transportation Union v. Grand Trunk Western Ry.*, 6th Cir. No. 89-1523 (decided February 21, 1990). Indeed, the importance of the issues presented here is further illustrated by the significant amount of litigation which has occurred over the last several years concerning the scope of a party's national bargaining obligation, as carriers have sought to unilaterally remove themselves from national handling.[3] Apart from the possible destabilization

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[3] In addition to the instant case and *Grand Trunk Western*, there have been many cases filed recently concerning national handling. Among the current cases are: *Railway Labor Executives' Association v. National Railroad Passenger Corporation*, D.D.C. No. 88-1816; *United Transportation Union v. Lake Terminal R.R., et al.*, N.D. Ohio, No. C 88-3414; *United Transportation Union v. Elgin, Joliet & Eastern Ry.*, N.D. Ill. No. 88-C-7708; *United Transportation Union v. Texas-Mexican Ry.*, S.D. Tex., No. L-89-7; *United Transportation Union v. Atchison, Topeka & Santa Fe Ry.*, N.D. Ill. No. 89-C-06469; *United Transportation Union v. Duluth, Missabe & Iron Range Ry.*, D. Minn. No. 5-88-178; *United Transportation*

of national handling generally, the Eighth Circuit's decision seriously undermines the railroad industry's national health and welfare plans which have been a basic element of rail industry working conditions for over thirty years.

Additionally, this Court's consideration of this matter is necessary to resolve the conflict between the District of Columbia Circuit's decision in *Atlantic Coast Line* and the Eighth Circuit's decision in the instant case. Also, the Court's review is necessary to clarify the nature of the obligation of carriers and rail unions in national handling, which the Unions submit, does not dictate the identity of a party's representative, but which does involve the locus of bargaining over issues which are appropriate for national handling.

I. THE INSTANT CASE INVOLVES IMPORTANT ISSUES CONCERNING COLLECTIVE BARGAINING IN THE RAILROAD INDUSTRY

The practice of multi-party bargaining began at the turn of the century as a union response to arguments by carriers that they could not agree to improved rates of pay, rules and working conditions unless their competitors were subject to such improved terms. *Jones*, *supra*, at 34-35. By negotiating certain standardized collective bargaining agreements, workers were able to achieve improved terms of employment and carriers were able to agree to such terms without fear of being undercut by a

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Union v. Terminal R.R. Association of St. Louis, S.D. Ill. No. 89-3070; *United Transportation Union v. Chicago Illinois Midland Ry.*, C.D. Ill. No. 89-3014; *United Transportation Union v. Illinois Central Ry.*, N.D. Ill., No. 88-C9607; *United Transportation Union v. Houston Belt & Terminal Ry., et al.*, S.D. Texas No. H-89-439. Two additional cases dealing with national handling issues were filed in the last few years but were dismissed on grounds unrelated to their merits; *International Brotherhood of Electrical Workers, et al. v. National Railway Labor Conference*, 132 LRRM 2412 (D.D.C. 1988) and *United Transportation Union v. Chicago, South Shore & South Bend Ry.*, N.D. Ill. No. 89-C-0901.

competitor or whipsawed by a union, at least with respect to the subjects of those agreements. Those same considerations have been recognized as demonstrating the importance of national handling in more recent times. *See e.g. IAM v. NRLC, supra*; *Kennedy v. Long Island R.R.*, 211 F. Supp. 478, 488 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963)

The mutually perceived benefits of national handling have resulted in national agreements which have been negotiated covering many of the most fundamental elements of the employees' collectively established employment conditions, including, but not limited to: wages, vacations, holidays, grievance procedures, the eight-hour day and overtime pay, the union shop, health and welfare benefits and employee protective arrangements applicable in railroad mergers, abandonments and subcontracting.[4] Some of those agreements involved substantially all of the unions and all of the major carriers, while others (where it was more appropriate) involved one or more unions and all of the major carriers. In any event, it is clear that national handling has been for more than half a century, and still is, an important factor in the rail industry's labor relations, since national agreements govern some of the most fundamental components of rates of pay, rules and working conditions other than those, which by their nature, are most appropriately handled in negotiations between individual unions and individual carriers.

The contribution of these national agreeemnts to stability in rail industry labor relations is readily apparent;

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[4] *E.g.*, The National Vacation Agreement of December 17, 1941; the Forty (40) Hour Week Agreement of March 19, 1949; the Union Shop Agreement of August 29, 1952; the National Health and Welfare Plan Agreement of August 21, 1955, the 1964 Shopcrafts Agreement and the Washington Job Protection Agreement of 1936. All of these agreements are on file with the National Mediation Board pursuant to Section 5(e) of the RLA. Wages have historically been negotiated nationally and there are many wage agreements on file with the NMB.

those agreements have established common working conditions for employees of the major railroads, standardized certain labor costs for those carriers and promoted continuity in the terms of the agreements covering those terms of employment. At least among the major carriers, which comprise the vast majority of rail trackage in the nation, wages, hours, vacations, health and welfare benefits and most rules, are uniform under national agreements. Accordingly, this industry has not been subject to the competition among employee groups to obtain as much as, or more than, other employee groups with respect to those subjects, and thus, a significant source of employee discontentment leading to union resort to self-help to remedy perceived inequities has been substantially reduced. Additionally, the major carriers have relatively similar labor costs in the areas addressed by the national agreements, which are in reality their major cost items, so that there generally has not been, until recently, a movement among the carriers to gain a competitive edge against other carriers by seeking concessions from their employees, and thus, this industry has not been subject to one of the major causes of labor unrest—employers using their labor costs as the main source of competition and profits. Accordingly, the national agreements have been a bulwark of stable industry labor relations for more than fifty (50) years.

The Unions submit that the Eighth Circuit's decision, if allowed to stand, would substantially undermine the stability provided by the national agreements. If carriers could exit from national agreements merely by refusing to participate in negotiations occurring after the running of a moratorium period, and by seeking to negotiate locally with only the unions which represent *their* employees over their withdrawal from such agreements, those agreements, obtained through painstaking negotiations and significant give-and-take on both sides of the table, could be rendered ineffective by the decision of one or more carriers to withdraw based upon some perceived

short-term gain to be obtained through individual bargaining.

Furthermore, if one or more major carriers did unilaterally withdraw from national handling on a given issue, there is a substantial likelihood that the union or unions involved would need to resist that withdrawal, and eventually would have to strike in order to prevent a departure from the national standard terms of employment; likewise if the carriers which bargained individually did obtain more advantageous terms, there is a substantial likelihood that the carriers which remained in national handling would press for concessions to prevent a competitive disadvantage with respect to the carriers which had withdrawn. Additionally, just the possibility of a multiplicity of negotiations over the same issues would increase the risk of disruptive disputes. Thus, the unilateral withdrawal of a party to a national agreement from bargaining over that agreement, and that party's individual negotiations over the same subject, would create significant risks and pressures on both sides of the bargaining table which would obviously engender increased resort to self-help with regard to subjects which previously had been governed by national agreements. By contrast, a requirement that a party negotiate its withdrawal from a national agreement in the same manner that it became a party to that agreement would respect the collective bargaining rights of all parties to the agreements, while maintaining a certain stability by preventing unilateral withdrawal from national bargaining over the subject of such agreement.

The reasons for requiring a negotiated exit from national handling are particularly compelling with regard to the subject of the health and welfare agreements. Obviously, health and welfare benefits are one of the basic components of any collective bargaining agreement today. Moreover, it is a subject which is uniquely well-suited for national handling because of the advantages obtained in

cost reduction through spreading risk among an extremely large pool of employees and a number of employers in different geographic areas of the country; when a carrier and its employees leave a national plan, the benefits obtained by spreading risks and premium obligations are reduced, both for that carrier and its employees and for the industry as a whole. Moreover, the ability of employees to remain with the same insurance carrier when they change from one railroad to another is a benefit to both employers and employees, preventing disputes over benefits coverage for such employees. Thus, health and welfare benefits coverage is a subject which is particularly appropriate for national bargaining. It is also a subject which has generated some of the most difficult collective bargaining in all American industry in recent years, and it is likely to continue to be a source of significant friction between labor and management in the near future; fracturing of bargaining over this subject in the rail industry will only increase the likelihood of disruptions of commerce over disputes on this subject.

Thus, given the foregoing, the Unions submit that the Eighth Circuit's decision allowing parties to unilaterally withdraw from national handling of health and welfare issues and to bargain individually over their withdrawal from the national plans presents substantial risks for increased strife in the railroad industry and there is therefore an urgent need for this Court to review the validity of the Eighth Circuit's decision.

II. THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH DISTRICT OF COLUMBIA CIRCUIT PRECEDENT

The questions of whether and when a rail carrier, or a rail union, is required to engage in national handling on a particular issue was first addressed in 1967 by the Court of Appeals for the District of Columbia Circuit in *Atlantic Coast Line*. That case involved negotiations between the Brotherhood of Railroad Trainmen [hereinafter,

"BRT"] and eighty (80) carriers concerning the "crew consist" (i.e., the number of employees assigned a train's crew) rules for road and yard crews. The carriers contended that the issue should be subject to national handling because similar proposals were served simultaneously on a large number of carriers; the BRT contended that national handling was appropriate only upon mutual consent of the parties. The Court of Appeals for the District of Columbia Circuit held that national handling was not mandatory in that case. The court reached that conclusion after noting that while crew consist rules had occasionally been discussed on a national level, there had never been a national crew consist rule; that thousands of crew consist rules had been negotiated at the local level and that the neutral members of a special arbitration board [5] had opined that crew consist issues should be handled locally. The Court then stated that, 383 F.2d at 299, emphasis added:

> What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. *Whether it is also obligtaory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.* The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue.

The *Atlantic Coast Line* decision was subsequently relied upon in two decisions of the United States District Court for the District of Columbia: *Chicago, Burlington & Quincy R.R. v. Railway Employees Department, AFL-*

[5] Appointed pursuant to special legislation extending the cooling-off period in a previous dispute on that subject.

CIO, 301 F. Supp. 603 (D.D.C. 1969) (*"CB&Q v. RED"*), and *IAM v. NRLC, supra.* In *CB&Q v. RED*, several unions sought negotiations with one carrier for a special agreement on contracting-out of work to correct specific problems which had occurred on that carrier. The court concluded that because contracting-out had historically been negotiated on a national basis, and because the unions had sought national handling of contracting-out issues with other carriers, the unions could not compel the single carrier to negotiate individually regarding the proposed special agreement. Thus, the court stated (301 F. Supp. at 607, *citing Atlantic Coast Line*, 383 F.2d at 229):

> Having recognized the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees as the national representative of the carriers [when they negotiated the agreement they were now seeking to amend], the unions are not now free to compel the Burlington Railroad to bargain with them on a unilateral basis and thus break up the established multi-employer bargaining unit. When such a pattern of national bargaining has been established and the issues are not unique to the unions' dealing with any specific carrier, then both "the practical appropriateness of mass bargaining on that point" and "the historical experience" in h[illegible] the issues [sic] in the past make national ha[illegible] the matter obligatory.

In *IAM v. NRLC*, the court held that unions, which had historically negotiated wages on a national basis, and which had served identical Section 6 Notices for wage increases on each of the Class I railroads in the nation, could not strike individual railroads to obtain individual agreements. 310 F. Supp. at 611-612, *citing Atlantic Coast Line*, 383 F.2d at 229. The court concluded that the practicality of national bargaining on wages was "readily apparent" because "if wage adjustments were to be handled on an individual carrier basis, each carrier would be deterred from settling because of the possibility that a

competing carrier might obtain better terms, and by the same token, union members would be dissatisfied if employees on other railroads doing the same job, received higher salaries." *Id.* at 912.

In the courts below, the Soo argued that the *Atlantic Coast Line* standards regarding when national handling is mandatory were mere *dicta*; the Eighth Circuit noted Soo's contention, but did not accept or reject that claim. Appendix A at 5a. The Unions submit that upon review of the facts and the issues presented in *Atlantic Coast Line*, it is clear that the conclusion that national handling may be obligatory in appropriate circumstances was definitely not *dicta*. The *Atlantic Coast Line* court noted that the carriers had argued that national handling was mandatory "when similar proposals are served at about the same time by or upon a number of carriers" (383 F.2d at 228), and that the union had argued, as the Soo did and as the Eighth Circuit held, that national handling must be voluntary and that if it could be mandatory, a party could nonetheless provide sufficient advance notice of an intention not to engage in national handling and thereby relieve itself of any obligation to engage in national handling. *Id.* at 229. It is therefore clear that the question of whether national handling could be mandatory was squarely before the court of appeals in *Atlantic Coast Line*. The court then concluded that national handling could be mandatory in certain circumstances, but it rejected the formulations of both the carriers and the Unions and instead adopted a case-by-case approach which examined the nature of the subject for bargaining and the history of bargaining on that subject. 383 F.2d at 229. It then applied those standards in finding that national handling was not required in the case before it.

Moreover, any claim that *Atlantic Coast Line*'s discussion of when national handling is mandatory was mere *dicta*, is refuted by the district court's decisions in *IAM v. NRLC*, and *CB&Q v. RED*, and by the D.C. Circuit's

subsequent decision in *Delaware and Hudson Ry. v. United States*, 450 F.2d 603 (D.C. Cir. 1971), in which the court held that, although a union could not strike individual carriers to obtain an individual agreement on a matter subject to national handling, the union could strike individual carriers for the purpose of obtaining a settlement on a national agreement. In so holding, the court of appeals stated that the district court in *IAM v. NRLC* had "correctly understood the import and implication of our *Atlantic Coast Line* ruling" in concluding that national handling may be obligatory in some circumstances, depending upon the issues involved, the "practical appropriateness of mass bargaining" and the history of bargaining on the issue. 450 F.2d at 608-09.

Thus, prevailing precedent in the District of Columbia Circuit is that national handling may be mandatory regardless of whether a party states an intention to refuse national handling prior to the commencement of negotiations, and that whether national handling will be mandatory depends upon the appropriateness of the issue for national handling and the history of bargaining over that issue. Furthermore, it is readily apparent that in rejecting the BRT's argument that national handling must be voluntary, or that a party could give adequate notice of its intention to refuse national handling, the D.C. Circuit necessarily rejected the reasoning adopted by the Eighth Circuit in the instant case. Accordingly, the Eighth Circuit's conclusion that the nature of the issue and the history of bargaining over that issue are irrelevant (Appendix A at 5a), and that a party may refuse national handling merely by stating that it intends to bargain individually prior to commencement of negotiation of changes in the national agreement, is squarely in conflict with precedent in the D.C. Circuit.

The Unions submit that the D.C. Circuit's decisions are consistent with the commands of Section 2 First of the RLA, which require that parties exert every reasonable effort to make and maintain agreements, and with this

Court's recognition that railroad industry agreements are "usually of unlimited duration", and are generally only modified by subsequent negotiations which occur after running of moratorium clauses, as well as the Court's holding that after a strike, existing agreements continue in force except as modified by the strike settlement. *Brotherhood of Railway and Airline Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246-248 and n.7 (1966).[6] The Unions further submit that the D.C. Circuit's decisions are also consistent with practice in the railroad industry over many years and with practical realities in the industry. By contrast, the Eighth Circut's decision allowing a party to withdraw from national handling whenever a moratorium period runs, and before bargaining on changes in an agreement begins, is not consistent with the statute, this Court's precedent or the history and practice in this industry. Accordingly, this Court should review the Eighth Circuit's decision in order to resolve the conflict between that decision and the D.C. Circuit's precedent on this crucial issue.

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[6] The fact that rail industry agreements do not expire, also undermines the Eighth Circuit's reliance on NLRA precedent under which a party may withdraw from multi-party bargaining prior to commencement of negotiations on a new contract (Appendix A at 7a, *citing Bonanno Linen Service v. NLRB*, 454 U.S. 404, 410-412 (1982)); NLRA agreements do expire and are replaced by new contracts. *See Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22, 26-27 (2d Cir. 1988); *Lumber Production Industrial Workers Local #1054 v. West Coast Industrial Relations Association*, 775 F.2d 1042, 1046 (9th Cir. 1985); *Proctor & Gamble Independent Union v. Proctor & Gamble Manufacturing Co.*, 312 F.2d 181, 184 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963); *Patterson Parchment Paper Co. v. International Brotherhood of Papermakers*, 191 F.2d 252 (3rd Cir. 1951), *cert. denied*, 342 U.S. 933 (1952). By contrast, RLA agreements continue indefinitely, subject only to amendment. Accordingly, service of proposals for changes in RLA agreements cannot be analogized to opening of negotiations on new NLRA agreements when existing agreements expire.

III. REQUIRING THE SOO TO NEGOTIATE NATIONALLY OVER ITS PROPOSED WITHDRAWAL FROM THE NATIONAL HEALTH AND WELFARE PLANS WOULD NOT INFRINGE UPON THE SOO'S RIGHTS UNDER SECTIONS 2 THIRD AND FOURTH OF THE RAILWAY LABOR ACT

The Eighth Circuit concluded that the rationale of *Atlantic Coast Line* and its progeny, as well as the requirement of Section 2 First of the RLA that carriers and unions exert every reasonable effort to make and maintain agreements, were irrelevant to the outcome of this case which, the court held, turned upon the Soo's rights under Section 2 Third of the RLA to designate its own representative for collective bargaining. Appendix A 5a-7a. The Court noted that the Unions recognized the Soo's rights under Section 2 Third, but concluded that the Unions' argument was nonetheless at odds with that provision. *Id.* at 7a. The Unions submit that this conclusion was in error and was based upon a misunderstanding of the Unions' position, as well as the nature of national handling.

The Court correctly found that the Unions recognized that the Soo has a statutory right to select its own bargaining representative; indeed, the Unions have consistently and explicitly made that point. The Unions' position was that the Soo was required to negotiate its proposal for its withdrawal from the national plans at the national bargaining table in conjunction with national bargaining over the national plans; the Unions explicitly stated that they did not care whether the Soo designated the National Carriers' Conference Committee as its representative, or whether it came to the national bargaining table as its own representative.[7] And, the Unions acknowledged that so long as the Soo participated in the national bargaining

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[7] *See* the Unions' responses to the District Court's inquiry on that subject, Joint Appendix at 229, 451, the Unions' opening brief to the court of appeals (at 28 n.18) and their reply brief (at 2-6).

and bargained in good faith, it could refuse to agree to every proposal for changes in the national plans and could bargain to impasse on its own proposal for its withdrawal from the national plans. At no time did the Unions insist that the Soo designate the NCCC, or anyone else, as its bargaining agent. *Id.*

The Eighth Circuit's conclusion to the contrary appears to be premised upon its confusing of the process of national handling with the manner in which that process has generally been conducted. The court began its decision with the observation that national handling "refers to the collective bargaining practice whereby railroads and unions give bargaining authority to multi-carrier and multi-union committees, agreeing in advance to be bound by a national agreement reached by the two committees." Appendix A at 2a n.1. However, the court cited no authority for that characterization of national handling, and no other decision which discusses national handling describes it as requiring the participants to forego the right to represent themselves.[8] Rather, all of those decisions discuss national handling as a process by which certain subjects, which must be addressed in negotiations throughout the industry, and for which uniform treatment has been deemed desirable by the parties, are negotiated nationally.[9]

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[8] The Eighth Circuit's assumption as to the conduct of national bargaining is also incorrect historically, for until the 1970s, the carriers were divided into three carrier conference committees. Those conference committees were the designated representatives of their member carriers and they, in turn, would select one spokesperson who would actually conduct the negotiations, but who had no power to bind the conference committees or their members.

[9] Indeed, the district court concluded (Appendix B at 18a; footnote omitted), the Unions submit correctly, that:

> "Soo's right to select its bargaining representative therefore does not resolve the question whether it is obligated to participate in national handling. That is, it is possible that Soo, even if it chose to represent itself, may have been required to partici-

The key component of national handling is not the identity of the parties' representatives, but rather the locus of bargaining,—*i.e.*, the national bargaining table as opposed to carrier by carrier bargaining. And, although the participants have generally found it convenient to bargain through national agents, there is nothing inherent in the nature of national handling which requires the designation of the same bargaining agents. *See*, note 8, *supra*. Accordingly, the Eighth Circuit began its analysis of this case with the erroneous assumption that requiring the Soo to participate in national handling would mean requiring it to designate the NCCC as its bargaining agent; and it was upon that erroneous assumption that the court discounted the Unions' assertions that they had no intention of dictating the Soo's choice of bargaining representative, and rejected the Union's basic argument.

The Unions therefore submit that the Eighth Circuit reached an incorrect result because its analysis began from an erroneous premise regarding the nature of national handling. The Unions further submit that resolution of this case does not require the interpretation or application of Section 2 Third of the RLA, and that the Soo's rights under that provision would not be infringed by an order requiring that it negotiate nationally over its proposed withdrawal from the national health and welfare plans, and that it continue to participate in national negotiations until it either obtains an agreement or reaches impasse on its proposed withdrawal from the plans.

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pate in centralized negotiations with a coordinated labor bargaining representative such as the CRLO as well as with the NCCC."

CONCLUSION

For the reasons stated herein, petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review and reverse the judgment of that court in *American Railway and Airway Supervisors Association, et al. v. Soo Line R.R., supra.*

Respectfully submitted,

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Date: March 13, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-5350

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, (DIVISION OF BRAC); BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (DIVISION OF BRAC); HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION; RAILROAD YARDMASTERS OF AMERICA (DIVISION OF UTU); SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; and UNITED TRANSPORTATION UNION;

Appellants,

v.

SOO LINE RAILROAD COMPANY,

Appellee.

Appeal from the United States District Court
for the District of Minnesota

Submitted: May 8, 1989

Filed: December 13, 1989

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

LAY, Chief Judge.

This is a suit seeking declaratory and injunctive relief to require national bargaining [1] over the proposed modification of health and welfare benefits between eleven rail unions and Soo Line Railroad Company. The district court [2] granted summary judgment in favor of the railroad, and the unions appeal. We affirm.

Background

In early 1984, the unions, pursuant to section 6 of the Railway Labor Act (RLA or the Act), 45 U.S.C. § 156 (1982), served notice on the railroad that they intended to request changes in pay rates, work rules, and benefits, including health and welfare plans, covering railroad employees. Since 1955, the parties have jointly subscribed to national, industry-wide health and welfare plans. Various modifications of these plans were made over the years

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[1] National bargaining, or "national handling" as it is called in the railroad industry, refers to the collective bargaining practice whereby railroads and unions give bargaining authority to multi-carrier and multi-union committees, agreeing in advance to be bound by a national agreement reached by the two committees.

[2] The Honorable Diana E. Murphy, United States District Judge for the District of Minnesota.

through national bargaining agents.[3] In 1985, the three existing health and welfare plans covered approximately 320,000 active employees and some 9500 retired employees on 242 railroads.

When the unions requested the latest modifications, Soo refused to negotiate health and welfare matters on a national basis. Soo informed the unions that it intended to negotiate these matters locally, and that it intended to withdraw from the national plans and develop its own plans through self-insurance.

The unions insist that under the Act the railroad is obligated to participate in national bargaining over the proposed changes in the health and welfare plans. They argue that Soo may not even attempt to negotiate a withdrawal from the national plans without first serving a section 6 notice to negotiate a withdrawal from the national bargaining process itself.

The district court rejected this argument on the ground that national bargaining had not yet commenced, relying on cases interpreting the National Labor Relations Act (NLRA). *See, e.g., Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982).[4] The unions argue that NLRA case law does not apply, citing fundamental dif-

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[3] Generally the bargaining agents have been the Health and Welfare Committee of the Cooperating Railway Labor Organizations for the employees, and the National Carriers' Conference Committee for railroads. The various agreements reached by these negotiators were of unlimited duration but contained moratorium clauses which precluded changes over a period of time.

[4] *Bonanno Linen* held that the National Labor Relations Board (NLRB) could prevent an employer from withdrawing from a multiemployer bargaining unit once bargaining had commenced, notwithstanding an impasse in negotiations. The Court, however, acknowledged with approval the NLRB's policy of allowing unrestricted withdrawal *prior* to the commencement of bargaining, stating that such a policy "recognized the voluntary nature of multiemployer bargaining." 454 U.S. at 412.

ferences between the NLRA and the RLA. The unions contend that the district court erred in failing to recognize that whether national bargaining is obligatory under the RLA depends not upon whether such bargaining has commenced, but rather, on (1) the nature of the issue, and (2) the history of bargaining on that issue. *See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968).[5] The unions argue historical bargaining practice and the importance of the health and welfare coverage mandate continued national bargaining on the issue.[6]

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[5] The issue in *Atlantic Coast Line* was whether a union had breached its duty to bargain by refusing to negotiate with a multi-carrier representative. *See Atlantic Coast Line R.R. v. Brotherhood of R.R. Trainman*, 262 F. Supp. 177, 184-85 (D.D.C.), *rev'd*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968). The lower court, relying on section 2 of the Act, held that the union was obligated to negotiate with the multi-carrier representative. *Id.* at 187-88. The court of appeals reversed on the ground that the particular issue at hand had traditionally been negotiated on a local, rather than national, level. 383 F.2d at 229. The court went on to state the following:

> What constitutes good faith bargaining in the railroad industry is colored by how parties have actually bargained in the past. The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.

Id.

[6] The union does not contend that a section 6 notice under the Act is necessary on the ground that it is a modification of the collective bargaining agreement to sever the health and welfare issue from negotiation of wages and working conditions which are still authorized for national bargaining. This complex question is not briefed and our holding does not consider such a contention.

The railroad counters that since a new round of national bargaining has not yet commenced, it is not obligated to bargain through a national representative. Compelling it to do so, the railroad contends, would contravene section 2 of the Act which provides each party the freedom to select its own bargaining representative. *See* 45 U.S.C. § 152 Third. The railroad argues that the right to select its own representative provides the correlative right to bargain on a local basis and not be bound by any national agreement to which it is not a party.

The unions insist the railroad merely confuses the issue in basing its argument on the basic statutory right to select its own representative. The unions acknowledge that right, but urge that unless the railroad negotiates its way out of national bargaining it must accept the agreement reached by the national negotiators.

Discussion

Whether it is dicta as the railroad argues or holding as the unions maintain, we are not convinced that the two-part test suggested in *Atlantic Coast Line* can be applied here. The unions are correct that the Act's mandate to "exert every reasonable effort to make and maintain agreements," *see* 45 U.S.C. § 152 First, imposes upon the railroad an affirmative duty to negotiate in good faith with the unions. *See, e.g., Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570. 574-75 (1971); *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 714-25 (1945) (duty applies to grievances and major disputes). Repeating the district court's observation, however, we are aware of no decision that construes this duty to obligate the railroad to bargain for a national contract through a national bargaining representative. The unions' argument ignores the statutory right of each party to designate a representative with whom the other party's representative must negotiate.

The RLA clearly states that both carriers and employees have the right to designate their own representatives for bargaining:

> Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

45 U.S.C. § 152 Third. *See also* 45 U.S.C. § 152 Fourth ("Employees shall have right to organize and bargain collectively through representatives of their own choosing."). The Supreme Court has characterized this right to choose as the "essential foundation" of the Act:

> Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained.

Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 569 (1930). No existing agreement or statutory provision obligates the railroad to designate a national, multi-carrier representative to conduct its

negotiations. The railroad may bargain solely on its own behalf.[7] The unions appear to concede this and yet continue to argue as if it is not so.

The *Bonanno* line of cases recognize a limited exception to this basic right of choice in situations where one of the negotiating parties attempts to withdraw from multi-party bargaining after negotiations have begun. *See, e.g., Bonanno Linen*, 454 U.S. at 410-11 & n.5 (citing cases following this exception). Prior to the commencement of negotiations, the parties remain free to withdraw from their respective bargaining coalitions. *Id.* at 412. As the district court aptly pointed out, several of the cases cited by the unions in support of their argument can be read as applying these principles to bargaining under the RLA. *See American Ry. & Airway Supervisors Ass'n v. Soo Line R.R.*, 690 F. Supp. 802, 807 & n.6 (D. Minn. 1988) (citing *United Transp. Union v. Burlington Northern, Inc.*, 325 F. Supp. 1125, 1131 (D.D.C. 1971); *International Ass'n of Machinists & Aerospace Workers v. National Ry. Labor Conference*, 310 F. Supp. 905, 912 (D.D.C. 1970); *Chicago, Burlington & Quincy R.R. v. Railway Employees' Dept.*, 301 F. Supp. 603, 607 (D.D.C. 1969)); *accord Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 610-11 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971).

The unions argue that the *Bonanno Linen* principles are inapplicable here because of the unique nature of railroad labor contracts. Railroad labor contracts, unlike contracts under the NLRA, are perpetual in duration and are subject to modification only after predetermined moratorium periods. Thus, the unions apparently argue, the parties' obligations to participate in the national bargain-

[7] Until such bargaining is completed and the steps required by the Act exhausted, of course, Soo must continue to fulfill its obligations under the existing agreements. Indeed, the unions conceded at oral argument that Soo has done so. Soo is still paying premiums, and maintains the health and welfare coverage last agreed upon.

ing process continue indefinitely, or at least until the party desiring to withdraw serves notice and goes through the bargaining procedures mandated by the Act. We disagree. The clear import of the RLA is that each proposal for modification under section 6 initiates a new, distinct set of negotiations for which the parties are free to select new bargaining agents.[8] *See* 45 U.S.C. § 156. To conclude otherwise would, in effect, perpetually bind a carrier (or a union) to national representation once it agrees to such representation for a particular bargaining round. We agree with the district court that, as a policy matter, this would have the negative effect of discouraging parties from utilizing the national bargaining tool in the first place. *See Soo Line*, 690 F. Supp. at 807 n.8. In any event, we believe the Act speaks to the issue with adequate clarity, and conclude therefore that the *Bonanno Linen* principles are applicable here. Because a new round of national bargaining had not yet begun when Soo announced its intention to bargain locally, nothing prevents it from withdrawing from its national negotiating coalition.

We also cannot accept the union's argument that the railroad must serve section 6 notice of its intent to withdraw from national bargaining, and that it first must bargain over this "change." The selection of a bargaining agent is not a subject of mandatory bargaining under the Act. Nor is it a term in any existing agreement. It is a right reserved to the parties by the Act. The unions' argument that the railroad must serve notice and bargain over its decision to withdraw from national bargaining simply reads too much into the railroad's obligations under the Act and too little into its rights under the Act.

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[8] The past practice in the industry also supports this. Each time the unions have served section 6 notices on the carriers, they have requested the carriers to designated the NCCC or a similar group as their representative.

We emphasize that the right to designate a bargaining representative applies equally to both sides of the negotiating table; each side is obligated to "treat" with the other's designee. *See, e.g., Virginian Ry. v. System Federation No. 40*, 300 U.S. 51, 547-48 (1937). Indeed, the individual unions may seek to achieve significant bargaining power by coordinating their negotiating efforts. *See* Wagner, *Multi-Union Bargaining: A Legal Analysis*, 19 Lab. L.J. 731, 738 (1968) (discussing multi-union collective bargaining under the NLRA). The unions to some degree control their own destiny. If they splinter, as some already have done,[9] then separate agreements appear to be the order of the day. If the unions select a single representative, then that representative may lawfully insist that the same contract terms be applied to all unions that have given their prior approval.[10] In either case, the unions have the right to bargain for terms that match or exceed those of the current health and welfare plans. The railroad, of course, may in good faith attempt to bargain to secure a series of plans with individualized terms. Whether this bargaining will be objectively appraised as being in good faith will depend on many variables and uncertainties not at issue here.

Conclusion

In sum, we find that the railroad has no duty under the RLA to give notice to negotiate its withdrawal of a na-

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[9] Eight of Soo's nineteen unions have already independently negotiated for and agreed to new health and welfare plans.

[10] Cases interpreting the NLRA are instructive and support this point. *See General Electric Co. v. NLRB*, 412 F.2d 512, 519 (2d Cir. 1969) (upholding NLRB's determination that unions do not commit unfair labor practices by insisting that employer bargain with mixed-union negotiating committee); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44-45 (6th Cir. 1963) (same); *United States Pipe & Foundry Co. v. NLRB*, 298 F.2d 873, 877-78 (6th Cir.), *cert. denied*, 370 U.S. 919 (1962) (three unions may insist adamantly on identical terms in each of three separate labor contracts).

tional bargaining representative. The railroad has a statutory right to designate its own representative; it has no obligation to accept national bargaining and is not bound by national negotiations in which it chooses not to participate.[11] Correlative to this right, the railroad does have a duty to bargain with the representative or representatives so designated by the unions; it must bargain in good faith as to the terms and conditions of health and welfare coverage of the various employees represented by the union representatives.

For the reasons set forth herein, we find that the plaintiffs are not entitled to declaratory or injunctive relief. The judgment of the district court is therefore affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[11] The railroad concedes, however, that it does not argue over the situs of the negotiations, and is willing to negotiate in Washington, D.C. or another reasonable place chosen by union representatives.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-86-961

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, (DIVISION OF BRAC); BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (DIVISION OF BRAC); HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION; RAILROAD YARDMASTERS OF AMERICA (DIVISION OF UTU); SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; and UNITED TRANSPORTATION UNION;

Plaintiffs,

vs.

SOO LINE RAILROAD COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

John O'B. Clarke, Jr., Esq., Highsaw & Mahoney, Suite 210, 1050 17th Street, N.W., Washington, D.C. 20036, appeared for plaintiffs.

Linzey D. Jones, Esq., Sidley & Austin, One First National Plaza, Chicago, IL 60603; and Patrick J. McPartland, Esq., and Barry McGrath, Esq., Soo Line Railroad Company, 105 Fifth Street South, Minneapolis, MN 55440; appeared for defendant.

Plaintiffs are rail labor organizations that brought this action on behalf of their members against defendant Soo Line Railroad Company (Soo) under the Railway Labor Act (the Act or RLA), 45 U.S.C. §§ 151 *et seq.* Plaintiffs seek to compel defendant to continue to participate in national employee benefit programs and to continue in national bargaining as to those programs. Jurisdiction is alleged pursuant to 28 U.S.C. § 1337(a). Plaintiffs seek both declaratory and injunctive relief. Soo filed a counterclaim, asserting that plaintiffs are violating the Act by refusing to negotiate directly with defendant over employee benefits and seeking declaratory and injunctive relief. Now before the court is Soo's motion to dismiss for failure to state a claim or, alternatively, for summary judgment. Soo also moves for summary judgment on its counterclaim.[1]

BACKGROUND

On this motion to dismiss or for summary judgment, the court views the facts in the light most favorable to plaintiffs. Since 1954, rail labor unions and rail carriers have

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[1] On January 14, 1988, the court ordered the parties to respond to six questions dealing with the factual background and legal issues. Each party then submitted a response and a memorandum in reply to the response of the other. These were received by February 16, 1988.

generally negotiated employee benefits on a national basis with designated national bargaining agents negotiating any changes. This is referred to as "national handling." When carriers, including Soo, have participated in national handling, they have ordinarily given a power of attorney to the National Carriers' Conference Committee (NCCC) to negotiate on their behalf. The rail labor unions have similarly designated one bargainng agent, such as the Health and Welfare Committee of the Cooperating Railway Labor Organizations (CRLO). These two entities would then bargain over the benefit plans and reach an agreement that would be binding on all participants.[2] Travelers' Insurance Company has issued the national health and welfare policies since 1955.

In early 1984, various rail unions served notices pursuant to 45 U.S.C. § 156 on a number of carriers, including Soo, proposing changes in wage rates, work rules, and benefits under the Travelers' health and welfare policies. The unions requested that each of the carriers designate the NCCC as its bargaining representative. Although it agreed to national handling of the proposals concerning wages and work rules, Soo refused national handling of health and welfare benefits, stating that it would negotiate those benefits "locally." Accordingly, Soo declined to grant its power of attorney to the NCCC with respect to these benefits, as it had done in the past. Soo advised the unions that it wished to negotiate these issues on its own behalf and that it intended to withdraw from the Travelers' policies and develop its own plans through self-insurance.

Soo states that it has now reached agreement with 8 of the 19 local unions representing its employees on self-

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[2] At least some of these agreements provided, however, that they are to be construed as separate agreements between the individual carriers and unions. *See, e.g.*, Agreement Between NCCC and Brotherhood of Railroad Signalmen Art. XIV, § 2(a) (Jan. 8, 1982) (Exhibit 33 to Affidavit of Charles W. Nelson).

insured plans that provide superior coverage.[3] Soo continues to pay premiums on the Travelers' policies for its employees whose unions have not agreed to the new plans. The organizations participating in national handling have reached agreement under which proposals are to be submitted to a "Special Committee" which will make nonbinding recommendations. In the meantime, benefits under the national health and welfare programs will be continued. If the recommendations of the Special Committee do not result in an agreement, those parties have the right to resume direct bargaining.

The Railway Labor Executives' Association (RLEA), of which the chief executive officers of plaintiffs are all members, brought an action identical to this one in the United States District Court for the District of Columbia in October 1985. The action was transferred to this district, but was dismissed by the Honorable Harry H. MacLaughlin on the ground that the RLEA lacked standing to bring the action. *Railway Labor Executives' Ass'n v. Soo Line R.R. Co.*, No. 4-86-379 (D. Minn. Dec. 24, 1986). In that action, Soo had moved alternatively to dismiss for failure to state a claim. In an extended footnote, the court stated in dicta that this argument also had "considerable merit." Slip op. at 23 n.12. By order dated January 27, 1987, the court deleted that footnote in response to a motion made pursuant to Fed. R. Civ. P. 59(e) by the RLEA. Plaintiffs filed this action on December 31, 1986, making the same claim and seeking the same relief. The case was assigned to this court; Judge MacLaughlin declined referral. Soo now moves to dismiss for failure to state a claim or, alternatively, for summary judgment.

DISCUSSION

Under the Act, both carriers and their employees have the duty "to exert every reasonable effort to make and

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[3] This constitutes only 10 percent of its employees, according to plaintiffs.

maintain agreements concerning rates of pay, rules, and working conditions" in order to avoid any interruption to commerce. 45 U.S.C. § 152 First. By giving notice pursuant to 45 U.S.C. § 156 ("Section 6 notice"), either party can propose a change in their agreement.[4] Under the Act, both carriers and employees have the right to designate their own representatives for bargaining:

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives.

45 U.S.C. § 152 Third.

Plaintiffs allege that Soo has violated the Act by refusing to participate in national handling and by not bargaining over its attempt to withdraw from the national programs. Plaintiffs argue that national handling of the employee benefit plans, under the circumstances here, is obligatory under the Act. Plaintiffs rely heavily upon *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R. Co.*, 383 F.2d 225, 229 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968), which stated that "[w]hether [national handling is] obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements." Soo argues that this statement was dicta; plaintiffs disagree. In plaintiffs' view, this case established that a case-by-case approach is appropriate and that national handling may be obligatory in some circumstances.

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[4] Labor agreements in the railway industry are usually of unlimited duration. They often contain "moratorium" clauses, however, that preclude proposals for change for limited periods. Declaration of Richard I. Kilroy para. 7.

Plaintiffs argue here that national handling is obligatory in view of the 34-year history of such handling and the circumstances surrounding employee benefits. Plaintiffs do not view defendant as perpetually bound to national handling; rather they state that "in order for the Soo to withdraw from national handling it must serve a separate Section 6 notice on that question and it must bargain with all of the parties involved in national handling before it can withdraw." Plaintiffs' Memorandum at 16.

Defendant Soo argues that this case is really about a party's right to designate its own representative for bargaining, as guaranteed by the Act. In its view, it simply decided not to designate the NCCC as its bargaining representative with respect to employee benefits. Soo asserts that the court should not rely upon the mere dicta of *Atlantic Coast Line* and argues that subsequent cases noting the dicta have all involved situations where one party began national handling and thereafter tried to withdraw. Here, by contrast, Soo argues that it selected local bargaining at the outset. As a policy matter, Soo contends that carriers will never agree to national handling if it necessarily becomes obligatory thereafter which, Soo suggests, plaintiffs' theory would require. Finally, even if the *Atlantic Coast Line* test were applicable, Soo argues that the subject of health and welfare benefits does not require uniform national handling.

With respect to its counterclaim, Soo argues that plaintiffs have violated the Act by refusing to negotiate with it on a local basis and by attempting to abrogate agreements already reached between it and some of the unions. Soo therefore seeks an order requiring plaintiffs' designated representatives to negotiate directly with it. Plaintiffs respond that they had no duty to negotiate directly with Soo because Soo has never served its own Section 6 notice proposing to withdraw from the national plans.

Two procedural aspects to bargaining may be distinguished. The first is who will represent the parties at the bargaining table, and the second is where it will take place. Soo focuses on the former, stressing its freedom to designate its representative and arguing that "[t]he situs of [the] negotiations is irrelevant." Defendant's Memorandum at 7 (Feb. 1, 1988). Plaintiffs stress the latter —whether bargaining will occur on a national or local level.

With respect to the first procedural aspect—choice of representative—the language of the Act explicitly guarantees each party's right to select its own representative "without interference, influence, or coercion." 45 U.S.C. § 152 Third. Under the Act, Soo therefore could not be required to designate the NCCC to negotiate on its behalf. Indeed, plaintiffs virtually acknowledged that fact by "respectfully requesting" Soo to designate the NCCC as its representative. *See, e.g.*, Letter of Brotherhood of Maintenance of Way Employes (April 2, 1984) (Exhibit 2 to Affidavit of Charles W. Nelson). Moreover, Soo cannot be required to bargain over its choice of representative because that right is protected by § 152 Third and because that topic would not appear to come within the language of § 152 First ("rates of pay, rules, and working conditions").

The second procedural aspect is more complicated. The parties have not provided a precise definition of "national handling." It appears that it would normally encompass centralized negotiations between two bargaining representatives, each of which represents more than one carrier or union, that result in a single agreement that applies to all of the participants. At times, however, it appears that a single carrier or union may bargain with the collective representative of the other side. *See* Affidavit of Charles W. Nelson, paragraph 21 (rail unions have sometimes bargained separately with the NCCC). If this latter situation is considered to be national han-

dling, then an organization's selection of its bargaining representative is independent from its choice whether to engage in national handling. Soo's right to select its bargaining representative therefore does not resolve the question whether it is obligated to participate in national handling. That is, it is possible that Soo, even if it chose to represent itself, may have been required to participate in centralized negotiations with a coordinated labor bargaining representative such as the CRLO, as well as with the NCCC.[5]

The parties have devoted much of their efforts to debating the relevance of *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R. Co.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968). In that case, the district court held that the Act authorized a group of carriers to insist upon national handling of negotiations over the issue of "crew consist." After examining the history of bargaining over that issue, the D.C. Circuit reversed, holding that national handling was not obligatory. The court explained:

> The Railway Labor Act does not universally and categorically compel a party to a dispute to accept national handling over its protest. Such bargaining is certainly lawful, however. Whether it is also obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements. The history and realities of crew consist bargaining in this industry impel the conclusion that mass handling was not required by the statute for bargaining on that issue.

Id. at 229. Plaintiffs argue that the *Atlantic Coast Line* ruling has been applied in a number of subsequent

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[5] That is, if other carriers had given their power of attorney to the NCCC.

decisions, citing *Delaware & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 609 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *General Comm. of Adjustment GO-377, United Transp. Union v. Grand Trunk Western R.R. Co.*, No. 86-CV-70036-DT (E.D. Mich. June 12, 1986); *United Transp. Union v. Burlington N. Inc.*, 325 F. Supp. 1125, 1131 (D.D.C. 1971); *International Ass'n of Machinists & Aerospace Workers v. National Ry. Labor Conference*, 310 F. Supp. 905, 912 (D.D.C. 1970), *appeal dismissed*, 463 F.2d 872 (D.C. Cir. 1972); and *Chicago, Burlington & Quincy R.R. v. Railway Employes' Dept.*, 301 F. Supp. 603, 607 (D.D.C. 1969).

A review of these cases, however, reveals that courts have found national handling to be obligatory only after the parties had commenced national bargaining and then one attempted to withdraw or take action inconsistent with national handling.[6] For example, in *Chicago, Burlington & Quincy R.R.*, the court found national handling to be obligatory but explicitly relied upon the fact that national bargaining had already commenced:

> Having recognized the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees as the national representative of the carriers, the unions are not now free to compel the Burlington Railroad to bargain with them on a unilateral basis and thus break up the established multi-employer bargaining unit.

301 F. Supp. at 607. The factual situations in the remaining cases cited by plaintiffs are similar. *See, e.g., International Ass'n of Machinists & Aerospace Workers*, 310 F. Supp. at 912 ("Having begun on a national level,

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[6] For example, in two of the cases the issue was "whether, after national handling of a dispute has failed to produce an agreement, a strike against an individual carrier who has been part of the multi-employer bargaining unit is legal." *International Ass'n of Machinists & Aerospace Workers*, 310 F. Supp. at 911; *see also United Transp. Union*, 325 F. Supp. at 1125.

it is incumbent upon the parties to continue to deal on a national level even after the procedures of the Railway Labor Act have been exhausted.").

These rulings are consistent with the National Labor Relations Act (NLRA) principle that withdrawal from multi-employer bargaining units may not be restricted prior to the commencement of bargaining.[7] In *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410-11, 412 (1982), the Supreme Court explained:

> These rules, which reflect an increasing emphasis on the stability of multiemployer units, permit any party to withdraw prior to the date set for negotiations of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. . . . The Board has recognized the voluntary nature of multiemployer bargaining. It neither forces employers into multiemployer units nor erects barriers to withdraw prior to bargaining.

Here, it is undisputed that Soo notified plaintiffs of its intention to bargain locally before the national bargaining commenced. As such, the present situation is distinguishable from those in the cases cited by plaintiffs. No decision has been identified that required a party to engage in national bargaining under similar circumstances. The Act itself fails to recognize or address the issue of national handling in any fashion whatsoever. This statutory silence, the lack of precedent imposing national handling under these circumstances, and the treatment of withdrawal from multiemployer bargain-

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[7] Plaintiffs contend that this principle cannot be applied in the Railway Labor Act context because of the unique nature of rail labor agreements. Although NLRA decisions are not binding precedent in this area, they may be instructive. *See, e.g., Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 574-75 (1971) (comparing duty to "maintain agreements" under RLA with duty to "bargain in good faith" under NLRA). Plaintiffs themselves have relied upon NLRA precedent. *See* Plaintiffs' Memorandum at 12-13 (Feb. 1, 1988).

ing units under the NLRA all indicate to the court that national handling should not be imposed here.[8]

Plaintiffs' contention that Soo failed to serve a required formal Section 6 notice concerning its proposal to develop its own health and welfare plans is unpersuasive. Although the precise requirements for a Section 6 notice are not clear, it appears that courts have approached such notices from a functional, rather than a merely technical, perspective. In *Pullman Co. v. Order of Ry. Conductors & Brakemen*, 316 F.2d 556, 562 (7th Cir.), *cert. denied*, 375 U.S. 820 (1963), the court stated:

> We believe that a Section 6 notice is adequate if it informs a party of the purpose sought to be attained by the other party with sufficient definition to enable the former to understand the implications of the notice and proposed means adapted to the goal's attainment.

See also Brotherhood of R.R. Trainmen v. Southern Ry. Co., 393 F.2d 303, 309 (5th Cir. 1968). Under this standard, Soo's response to plaintiffs' Section 6 notices functionally served as a Section 6 notice itself. Plaintiffs do not claim, and could not reasonably claim, that they were unaware of Soo's proposal.

Even if the *Atlantic Coast Line* standard were applicable and the court could require national handling, plaintiffs have failed to show that national handling would be obligatory under these circumstances. *Atlantic Coast Line* states that the "practical appropriateness of mass bargaining" and the "historical experience" of bargaining on that issue should be considered. It is far from clear that national handling is the most practically appropriate man-

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[8] Moreover, as a policy matter, the imposition of obligatory national handling based merely on past participation in such bargaining would likely discourage parties from engaging in national handling in the first place. *See RLEA v. Soo Line R.R. Co.*, No. 4-86-379, slip op. at 22-23 (D. Minn. Dec. 24, 1986).

ner in which to handle bargaining over health and welfare benefits. It is undisputed that Soo has reached agreements with 8 of its 19 local unions that appear to provide benefits superior to those provided by the Travelers' plans. *See* Affidavits of Stuart J. Nelson, Edward W. Barsness, and Al Procopio, Jr. Although many carriers have participated in national handling and the Travelers' plans, the practice has not been uniform. Numerous carriers have declined to authorize the NCCC to negotiate on their behalf and a number of railroads have discontinued participation in the Travelers' policies. *See* Affidavit of Charles W. Nelson paras. 23-30. On the record before the court, Soo is entitled to summary judgment on plaintiffs' claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Although Soo's motion for summary judgment on plaintiffs' claims should be granted for the reasons stated, its motion for summary judgment on its counterclaim should be denied. The parties have largely focused on plaintiffs' claims to the exclusion of Soo's counterclaim. The merits of the counterclaim, if any, are not clear on the record provided. Since Soo has not shown that it is entitled to summary judgment, this motion should be denied.

The motion deadline in this case is now past; the case is theoretically ready for trial. Counsel should submit letters to the court by July 25, 1988 discussing how they propose the litigation should proceed in light of this opinion. Counsel should state their positions on whether the motion deadline should be extended; what issues of fact, if any, remain; and how the final issues in this case may best be resolved.

ORDER

Accordingly, based upon the above and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's motion for summary judgment is granted, and the complaint is dismissed.

2. Defendant's motion for summary judgment on its counterclaim is denied.

3. Counsel are to respond on the issues raised in the opinion's last paragraph by July 25, 1988.

Dated: July 6, 1988

/s/ Diana E. Murphy
DIANA E. MURPHY

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-86-961

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, (DIVISION OF BRAC); BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES; BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (DIVISION OF BRAC); HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION; RAILROAD YARDMASTERS OF AMERICA (DIVISION OF UTU); SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; and UNITED TRANSPORTATION UNION;

Plaintiffs,

vs.

SOO LINE RAILROAD COMPANY,

Defendant.

ORDER FOR JUDGMENT

On July 6, 1988, the court ordered the parties to submit letters stating their positions as to how the litigation should proceed now that the complaint has been dismissed and only defendant's counterclaim remains. The responses of the parties to the order indicate that they are in substantial agreement on status matters.[1] Soo is currently engaged in negotiations with representatives of its employees over the establishment of an employee stock ownership plan which, if adopted, could resolve the subject matter of its counterclaim. The results of these negotiations should be known by January 1989. Both parties have suggested that Soo's counterclaim be dismissed without prejudice with leave to reinstate on or before January 15, 1989. Plaintiffs state that they desire to move for reconsideration of the court's order or, alternatively, for entry of final judgment on the complaint pursuant to Fed. R. Civ. P. 54(b). Soo does not oppose the entry of final judgment and in fact agrees that there is no just reason to delay plaintiff's efforts to obtain appellate review.

Fed. R. Civ. P. 54(b) provides in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

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[1] The parties continue to differ on the merits of the dismissed complaint. Plaintiffs seek reconsideration or appellate review of the court's order dismissing their complaint. Since this case has already been extensively litigated in this court and has received extended judicial consideration, reconsideration here does not appear to be warranted.

In considering the possible entry of judgment under Rule 54(b), "a district court must take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980). These administrative interests reflect "'the historic federal policy against piecemeal appeals.'" *Id.* (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956)). "Certifications under Rule 54(b) should neither be granted routinely nor as an accommodation to counsel." *Hardie v. Cotter & Co.*, 819 F.2d 181, 182 (8th Cir. 1987).

The court has carefully considered these precepts in the context of this case, but it appears there is no just reason for delay in the entry of final judgment on the complaint. Both parties agree to dismissal of Soo's counterclaim without prejudice. No claim will then remain to be adjudicated in this court. Although Soo would be entitled to reinstate its counterclaim on or before January 15, 1989, "[t]he mere presence of [a counterclaim] does not render a Rule 54(b) certification inappropriate." *Curtiss-Wright*, 446 U.S. at 9. Moreover, the complaint and the counterclaim raise distinct legal issues. "[N]o appellate court would [therefore] have to decide the same issues more than once even if there were subsequent appeals." *Curtiss-Wright*, 446 U.S. at 8 (footnote omitted). This litigation is important to the parties, and the history of the litigation makes it clear that the issues raised by plaintiffs' complaint will be appealed. This case is therefore unlike *United States Fire Ins. Co. v. Smith Barney, Harris Upham & Co.*, 724 F.2d 650 (8th Cir. 1983), for example. Finally, the remaining counterclaim will have been dismissed and those issues may never be litigated.

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendant's counterclaim is dismissed without prejudice, with leave to reinstate on or before January 15, 1989.

2. Final judgment shall be entered dismissing the complaint pursuant to Fed. R. Civ. P 54(b).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 28, 1988

/s/ Diana E. Murphy
DIANA E. MURPHY
United States District Judge

APPENDIX D

Statutes Relied Upon:

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First, 45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Second, 45 U.S.C. § 152 Second

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

C. Section 2 Third, 45 U.S.C. § 152 Third

Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other: and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion

seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

D. Section 6, 45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX E

PETITIONER LABOR ORGANIZATIONS

American Railway & Airway Supervisors Association (Division of TCU);

Brotherhood of Locomotive Engineers;

Brotherhood of Railroad Signalmen;

Brotherhood Railway Carmen (Division of TCU);

Brotherhood of Maintenance of Way Employes;

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineer's Beneficial Association;

Railroad Yardmasters of America (Division of UTU);

Seafarers International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation•Communications International Union;

and United Transportation Union.